BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANE FOWLKES	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,309
CAPITAL ELECTRIC CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS FUND	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant and the Workers Compensation Fund requested review of the Award dated January 31, 1997, entered by Administrative Law Judge Steven J. Howard. The Appeals Board heard oral argument on August 13, 1997.

APPEARANCES

Keith L. Mark of Mission, Kansas, appeared for the claimant. Dana D. Arth of Lenexa, Kansas, appeared for the respondent and its insurance carrier. Jeffrey S. Austin of Overland Park, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge granted claimant permanent partial disability benefits based upon her 10 percent functional impairment rating because she had removed herself from the open labor market and was not seeking employment. The Judge also assessed the entire award against the Workers Compensation Fund. Claimant requested the Appeals Board to review the issue of nature and extent of disability and the Workers Compensation Fund requested the Appeals Board to review the issue of Fund liability. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

As indicated above, the Administrative Law Judge found claimant had removed herself from the open labor market and was not seeking employment. Therefore, the Judge found the public policy considerations raised in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995), were applicable and the Judge limited claimant's award of permanent partial benefits to her stipulated 10 percent functional impairment rating. Claimant has never refused employment. She testified she is awaiting assignment of work from the union hall. Claimant contends Foulk is not applicable. Claimant's counsel states that respondent and its insurance carrier did not argue in their submission letter that Foulk was applicable and, therefore, counsel argues he was unaware that the principles announced in Foulk were in issue. However, at regular hearing claimant was cross-examined concerning her efforts to find work after the accident.

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits for the September 4, 1992, accident is governed by K.S.A. 1992 Supp. 44-510e, which provides in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

The Appeals Board agrees with claimant that Foulk does not apply to this situation. The Appeals Board finds claimant has made a good-faith effort in attempting to return to work as a journeyman electrician. That conclusion is based upon findings that claimant returned to work after her accident and attempted to perform her duties as an electrician and has also registered with her labor union to be placed on the list for work as it becomes available. Due to her injury, claimant has not been able to obtain and maintain employment as a journeyman electrician.

The evidence is uncontroverted that respondent has neither offered nor has claimant refused any offers of employment. Further, there is no evidence respondent has offered claimant vocational rehabilitation benefits or other vocational assistance to help claimant to return to work. After the September 1992 accident, claimant returned to her duties as a journeyman electrician and found she was unable to fully perform her assigned duties because of difficulties working overhead, lifting, and performing repetitive arm movements. It is unlikely claimant can return to work as a journeyman electrician without special accommodations. Claimant must now have appropriate accommodations for her permanent left shoulder injury in any job she may obtain.

As a result of the shoulder injury, claimant is now restricted to work below shoulder level and lifting 30 pounds or less. That conclusion is based upon the testimony and opinion of board-certified orthopedic surgeon Lowry Jones, Jr., M.D., who examined claimant in November 1995 at the Administrative Law Judge's request.

The first prong of the permanent partial disability formula as contained in the above-quoted statute is the loss of ability to perform work in the open labor market. Considering the testimony of both parties' vocational rehabilitation experts, the Appeals Board finds claimant has sustained a 50 percent loss of her ability to perform work in the open labor market as a result of her September 4, 1992, accident. Utilizing Dr. Jones' medical restrictions, vocational rehabilitation expert Gary S. Gammon indicated claimant had a 54 to 64 percent loss of ability to perform work in the open labor market as compared to vocational rehabilitation expert Richard W. Santner's opinion that claimant had a 37 percent loss.

The second prong of the permanent partial disability formula is the loss of ability to earn comparable wages. The Appeals Board finds claimant also lost 50 percent of that ability as a result of her work-related injury. That conclusion is based upon Mr. Gammon's and Mr. Santner's opinions that claimant retains the ability to earn $6 to $10 per hour and $6.55 to $17.36 per hour, respectively. Considering both opinions, the Appeals Board finds claimant retains the ability to earn between $10 and $11 per hour which equates to an approximate 50 percent wage loss when compared to the $848.01 average weekly wage which the parties stipulated claimant was earning on the date of accident.

As required by K.S.A. 1992 Supp. 44-510e, the Appeals Board considers both loss of ability to perform work in the open labor market and loss of ability to earn a comparable

wage and finds claimant has a 50 percent permanent partial general disability upon which her award should be based.

The Appeals Board also finds the Workers Compensation Fund has no liability in this proceeding because the respondent and its insurance carrier failed to prove claimant was handicapped before the 1992 accident or that respondent had knowledge of a preexisting impairment of such nature and character as to constitute a handicap in obtaining and retaining employment. The record is devoid of evidence that respondent knew of any medical restrictions which had been placed upon claimant before her September 1992 accident. Further, the record is devoid of evidence that respondent had knowledge that claimant had been given a permanent functional impairment rating by any physician before the accident in question. Claimant testified she did not miss work before September 1992 as a result of any physical problems. Although claimant may have had some limited discussions with one or more supervisors regarding her shoulder symptom before September 1992, the content of those discussions as portrayed in the record does not establish either that claimant was a handicapped worker, as that term is defined in K.S.A. 44-566, or, assuming claimant was handicapped, that respondent had knowledge of the handicap as required by K.S.A. 1992 Supp. 44-567.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated January 31, 1997, entered by Administrative Law Judge Steven J. Howard, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Diane Fowlkes, and against the respondent, Capital Electric Construction Company, and its insurance carrier, Builders' Association Self-Insurers Fund, for an accidental injury which occurred September 4, 1992, and based upon an average weekly wage of $848.01 for 30.29 weeks of temporary total disability compensation at the rate of $299 per week or $9,056.71, followed by 321.71 weeks at the rate of $282.69 per week or $90,943.29, for a 50% permanent partial general body impairment of function, making a total award of $100,000.

As of September 15, 1997, there is due and owing claimant 30.29 weeks of temporary total disability compensation at the rate of $299 per week or $9,056.71, followed by 232.14 weeks of permanent partial disability compensation at the rate of $282.69 per week in the sum of $65,623.66 for a total of $74,680.37, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $25,319.63 is to be paid for 89.57 weeks at the rate of $282.69 per week until fully paid or further order of the Director.

The Workers Compensation Fund has no liability in this proceeding.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Wade A. Dorothy, Lenexa, KS
Jeffrey S. Austin, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director